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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT CLARK,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 82A01-0608-PC-346
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable William H. Miller, Senior Judge
Cause No. 82D02-0109-CF-654

March 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Robert Clark, pro se, appeals the trial court's denial of his motion to correct erroneous sentence. Clark raises two issues, which we consolidate and restate as whether the trial court abused its discretion by denying Clark's motion to correct erroneous sentence. We affirm.

The relevant facts as set forth in our opinion in Clark's direct appeal follow.¹

In late August or early September of 2001, Melody Clark left Robert Clark, her husband of thirteen years. Melody and their twelve year-old daughter, Brittany, moved in with Melody's mother. On the morning of September 7, 2001, Clark went over to Melody's mother's house and used his key to enter Melody's car. Clark then hid in the car and waited for Melody to leave for work.

When Melody and Brittany got into the car they found Clark hiding on the floorboard. Clark then pulled out a knife and held it to Melody's breast. Melody pulled away from her mother's house and drove to her sister Penny's apartment. Clark then whispered to Melody that if she got out of the car he would kill her. Brittany exited the car and walked inside to Penny's apartment. Once she was inside the apartment she informed

¹ Clark describes the facts of this case as follows:

On September 5th, 2001 Robert Clark walked to his wife Melody's mothers house. His wife was on her way to drop the couple's daughter off at her sister's house and she agreed to take [Clark] to his van and assist him with jump starting it. Melody Clark drove to her sister's house where they drooped [sic] off the daughter. After the daughter was greeted at the front door the couple proceeded to Clarks van to assist him with a jump start. [Clark] told his wife he had a knife and demanded she return to his house to talk. Melody Clark exited the car while in route to [Clark's] van, she ran behind the house of strangers where she entered that house and telephoned police. Robert Clark gave chase however after he had seen Melody exit through the front door of the house he returned to the car and followed her down the street. Melody Clark willfully reentered the car and they proceeded toward Clarks house. While in route police intercepted the vehicle and ordered Clark out of the car. Clark was having difficulty removing his seatbelt so police assisted him and pulled him out the window, then charged him with resisting law enforcement.

Appellant's Brief at 5-6. Given the facts set out in the opinion on direct appeal, Clark's statement of the facts is inadequate. See Ind. Appellate Rule 46(A)(6) (providing that the statement of facts "shall be supported by page references to the Record on Appeal or Appendix" and the facts "shall be stated in accordance with the standard of review appropriate to the judgment or order being appealed").

Penny that Melody and Clark were in the car together. At around the same time, Clark instructed Melody to drive away. Concerned, Penny immediately called Melody on her cell phone to find out what was going on. In a trembling voice, Melody told Penny that they were going to Clark's van. Fearing Clark might harm Melody, Penny dialed "911."

Melody followed all of Clark's instructions, which eventually led them to Clark's parked van. As Melody pulled up to the back of the van, she got out of the car and ran down the street. As she ran from Clark, she spotted Carolyn Doane pulling out of her driveway to go to work. Melody approached Carolyn and told her that Clark was trying to hurt her. Carolyn opened the door and let Melody into her car. As Carolyn started to drive away, Clark drove into the front of Carolyn's car. Clark then reversed and proceeded to ram Carolyn's car a second time. Melody quickly jumped out of Carolyn's car and fled on foot until she reached a nearby house. Clark followed her in the car.

Melody entered the back door of the home of Brett and Amy Oakley and informed them that Clark was trying to hurt her. The Oakleys quickly locked all of the doors to their house. Clark soon appeared inside the furnished breezeway of the Oakley's home and began pounding on the kitchen door. Melody heard Clark's pounding and fled out the front door of the home. Clark then broke through the back screen door of the breezeway, ran to Melody's car, and sped out of the Oakley's driveway.

Clark saw Melody run behind a house, so he drove through the yard after her, mowing down a tree and striking the corner of the house in the process. He noticed Melody hiding behind a bush, so he drove toward her and hit her with the car. At that point, Melody blacked out. Clark then picked Melody up, cut her on the arm with his knife, and put her back into the car.

As Clark began driving away with Melody, police officers spotted the car and activated their lights and sirens in an attempt to pull Clark over. However, Clark sped up and proceeded to disregard several traffic lights and stop signs. At one intersection, Clark struck another car and continued on. He also forced Melody to call "911" and tell the operator to call off the officers' pursuit or else he would kill her.

Melody eventually convinced Clark to go to his brother's house. When they pulled into Clark's brother's driveway, the officers approached the vehicle and found Clark holding the knife to Melody. The officers' pointed their weapons at Clark and ordered him to drop the knife. At that moment, an officer shattered the driver's side window with his flashlight, which distracted Clark and allowed Melody to grab Clark's arm and struggle for control of the knife. Another officer quickly pulled Melody out of the passenger side of the vehicle while the other officers overtook Clark.

Melody sustained two cuts and bruising to her arms as well as bruising to her knee.

Clark was charged with attempted murder, a Class A felony; criminal confinement, a Class B felony; battery, a Class C felony; resisting law enforcement, a Class D felony; and residential entry, a Class D felony. A jury found him guilty of criminal confinement, battery, resisting law enforcement, and residential entry.

Clark v. State, No. 82A05-0203-CR-141, slip op. at 2-4 (Oct. 17, 2002). On direct appeal, we noted:

Some of the aggravating circumstances the trial court considered included: the presence of Clark's minor daughter during the incident and her subsequent emotional problems; the ramming of a "good samaritan's" car with passengers present; criminal recklessness with an automobile; damage to others property; battery during an attempt to capture; possession of a knife while resisting arrest; engaging in a high-speed chase with police; disregard for traffic laws; threats to police that certain acts to Melody would be done if they did not call off their pursuit; entry of a family's home with a knife while the parents and children were present. Some of the mitigating circumstances included the lack of a significant prior arrest record and specific acts of charity and kindness.

Id. at 6-7 n.1. On February 27, 2002, the trial court sentenced Clark to fifteen years for battery, five years for criminal confinement, two years for resisting law enforcement, and two years for residential entry, with all the sentences to be served consecutively, for a total of twenty-four years. Id. at 4.

Clark filed a direct appeal and argued that "the trial court inadvertently considered at least one aggravating circumstance that was not supported by the record and overlooked at least one significant mitigating circumstance that was clearly supported by the record" and that "his enhanced, consecutive sentences result in a manifestly unreasonable aggregate sentence." Id. at 5. We affirmed his sentence. Id. at 9.

In April 2003, Clark filed a petition for post-conviction relief but withdrew his petition in July 2003. In June 2006, Clark filed a motion to correct erroneous sentence. Clark argued that: (1) the trial court erred by imposing consecutive sentences because the aggravators were invalid under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh’g denied; and (2) the trial court erred by sentencing him to more than the presumptive sentence. The trial court held a hearing and denied the motion.

The issue is whether the trial court abused its discretion by denying his motion to correct erroneous sentence. We review a trial court’s decision on a motion to correct erroneous sentence “only for abuse of discretion.” Mitchell v. State, 726 N.E.2d 1228, 1243 (Ind. 2000), reh’g denied, overruled on other grounds by Robinson v. State, 805 N.E.2d 783, 787 (Ind. 2004). An abuse of discretion occurs when the trial court’s decision is against the logic and effect of the facts and circumstances before it. Myers v. State, 718 N.E.2d 783, 789 (Ind. Ct. App. 1999).

Ind. Code § 35-38-1-15, which governs a motion to correct erroneous sentence, provides:

If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. The convicted person and his counsel must be present when the corrected sentence is ordered. A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence.

In Robinson, the Indiana Supreme Court addressed the difference between a motion to correct erroneous sentence and a petition for post-conviction relief and held that “a

motion to correct sentence is available only to correct sentencing errors clear from the face of the judgment.” Robinson, 805 N.E.2d at 794.

When claims of sentencing errors require consideration of matters outside the face of the sentencing judgment, they are best addressed promptly on direct appeal and thereafter via post-conviction relief proceedings where applicable. Use of the statutory motion to correct sentence should thus be narrowly confined to claims apparent from the face of the sentencing judgment, and the “facially erroneous” prerequisite should henceforth be strictly applied We therefore hold that a motion to correct sentence may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of the statutory authority. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct sentence.

Id. at 787. Thus, a motion to correct sentence can be used to correct errors such as “illegal sentences in violation of express statutory authority or an erroneous interpretation of a penalty provision of a statute,” but will not be available for claims raising “constitutional issues or issues concerning how the trial court weighed factors in imposing sentence.” Id. at 786.

In addition to limiting a motion to correct sentence to errors apparent on the face of the judgment, Indiana case law has long emphasized that “the preferred procedure is by way of a petition for post-conviction relief.” This emphasis that post-conviction proceedings are “preferred” for raising sentencing error should not be understood to imply that the statutory motion to correct sentence is nevertheless permissible to raise claims that are not facially evident on the judgment. It is not. This Court “tries to encourage conservation of judicial time and energy while at the same time affording speedy and efficient justice to those convicted of a crime.” As to sentencing claims not facially apparent, the motion to correct sentence is an improper remedy. Such claims may be raised only on direct appeal and, where appropriate, by post-conviction proceedings.

Id. at 787 (footnote and internal citations omitted).

On appeal, Clark argues that: (1) the facts do not support the trial court's aggravator that the crime was committed in the presence of the couple's twelve-year-old daughter;² (2) because the aggravating factor was improper, no aggravator existed to support the imposition of consecutive sentences; (3) the aggravator was improper under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000); and (4) the maximum sentence was inappropriate in light of the nature of the offense and the character of the offender.³ Each of these arguments require consideration of matters in the record outside the face of the judgment.⁴ Consequently, Clark's arguments were not properly presented by way of a motion to correct erroneous sentence, and the trial court did not abuse its discretion by denying Clark's motion to correct erroneous sentence. See, e.g., Jackson v. State, 806 N.E.2d 773, 774 (Ind. 2004) (holding that the trial court properly denied the defendant's motion to correct erroneous sentence because a motion to correct sentence is available only to correct sentencing errors clear from the face of the judgment and is not available to challenge entries or omissions in an abstract of judgment).

² Even if we could address Clark's argument under Robinson, he did not make this argument to the trial court, and the argument is waived. See, e.g., Jester v. State, 551 N.E.2d 840, 843 (Ind. 1990) (holding that an appellant waives an issue by stating one ground for his position at trial and stating another ground on appeal).

³ We also note that Clark argued in his direct appeal that his sentence was manifestly unreasonable, and we affirmed his sentence. See Clark, No. 82A05-0203-CR-141, slip op. at 5, 9. "The doctrine of res judicata prevents the repetitious litigation of that which is essentially the same dispute." Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000), reh'g denied, cert. denied, 534 U.S. 1164, 122 S. Ct. 1178 (2002). A defendant "cannot escape the effect of claim preclusion merely by using different language to phrase an issue and define an alleged error." Id. This claim is also barred by res judicata.

⁴ We were not provided with the sentencing judgment in appellant's appendix, and we base this decision on the CCS entry.

For the foregoing reasons, we affirm the trial court's denial of Clark's motion to correct erroneous sentence.

Affirmed.

SULLIVAN, J. and CRONE, J. concur